

In the High Court of Malaya at Penang
In the State of Penang, Malaysia
Originating Summons No. PA - 24 C - 15 - 10 / 2023

In the Matter of an Adjudication (Reference No. AIAC / D / ADJ - 4849 - 2023) between Hai Loong Enterprise Sdn Bhd as the Claimant and China Construction Yangtze River (Malaysia) Sdn Bhd as the Respondent before Ar. Chung Pui Gin as the Adjudicator

And

In the Matter of the Adjudication Decision dated 5.10.2023 given by Ar. Chung Pui Gin

And

In the Matter of Section 12(4), Section 15(b), Section 15(d) and Section 16(1)(a) of the Construction Industry Payment and Adjudication Act 2012

And

In the Matter of Order 5 rule 3, Order 7, Order 28, Order 69A rule 3 and Order 92 rule 4 of the Rules of Court 2012

Between

China Construction Yangtze River (Malaysia) Sdn Bhd ... Plaintiff

And

Hai Loong Enterprise Sdn Bhd ... Defendant

Heard together with

In the High Court of Malaya at Penang
In the State of Penang, Malaysia
Originating Summons No. PA - 24 C - 25 - 11 / 2023

In the Matter of an Adjudication (Reference No. AIAC / D / ADJ - 4849 - 2023) between Hai Loong Enterprise Sdn Bhd as the



Claimant and China Construction Yangtze River (Malaysia) Sdn Bhd as the Respondent;

And

In the Matter of Adjudication Decision dated 05.10.2023 issued by Ar. Chung Pui Gin;

And

In the Matter of Section 28 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA');

And

In the Matter of Order 69A Rules 2 and 5 of the Rules of Court 2012;

And

In the Matter of Order 92 Rule 4 of the Rules of Court 2012.

Between

Hai Loong Enterprise Sdn Bhd ... Plaintiff

And

China Construction Yangtze River (Malaysia) Sdn Bhd ... Defendant

Grounds of Decision

Introduction

1. There are two related actions before me. Namely:

- (a) Originating Summons No. PA - 24 C - 15 - 10 / 2023 filed by China Construction Yangtze River (Malaysia) Sdn Bhd ("CCYR") on 20.10.2023.

This is an application to set aside ("setting aside application") the adjudication decision dated 5.10.2023 ("adjudication



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decision") delivered by the adjudicator Ar. Chung Pui Gin ("adjudicator") in an adjudication proceeding Reference No. AIAC/D/ADJ - 4849 - 2023 ("adjudication proceeding").

The setting aside application is made under section 12(4) (i.e. the adjudication decision does not contain reasons for the decision), section 15(b) (i.e. denial of natural justice), and section 15(d) (i.e. excess of jurisdiction) of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"); and

- (b) Originating Summons No. PA - 24 C - 25 - 11 / 2023 filed by Hai Loong Enterprise Sdn Bhd ("HLE") on 16.11.2023. This is an application to enforce the adjudication decision ("enforcement application"). The enforcement application is made under section 28 of CIPAA.
2. The two applications referred to above were heard together on 6.3.2024. I dismissed the setting aside application and allowed the enforcement application. Here are the grounds of my decision.

Background facts

Construction subcontract

3. By a subcontract entered into in the year 2018 ("subcontract"), CCYR appointed HLE as its subcontractor for the supply, installation, testing and commission of the rainwater downpipe, water and sewerage reticulation, cold water and sanitary plumbings and appliances works ("works") for a contract sum of RM7,758,215.70 in relation to a certain project ("project").
4. The employer of the project is Aspen Vintage Sdn Bhd ("employer"). CCYR is the main contractor for the project.

The payment dispute

5. HLE had submitted the following progress claims to CCYR:

Progress Claim No.	Date received by CCYR	Amount (RM)
29	20.4.2022	1,356,812.21
30	20.5.2022	1,289,380.42
31	20.5.2022	705,096.30
32	18.7.2022	609,841.18
33	23.8.2022	215,526.09



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34	19.9.2022	599,157.32
35	21.11.2022	637,872.13
36	17.1.2023	1,453,638.16

6. However, CCYR failed to assess and value HLE's progress claims and issue the interim certificate in accordance with clause 5 of the subcontract.

7. Subsequently, HLE completed the works in August 2022. However, CCYR failed to issue any certificate of practical completion to HLE.

8. On 14.2.2023, HLE was notified by CCYR that its contract with the employer has been terminated. HLE submitted its Final Claim dated 22.2.2023 for a sum of RM1,453,638.16 ("Final Claim") to CCYR as per CCYR's instructions. Again, CCYR did not assess HLE's claim and make payment thereof, after the submission of the Final Claim.

The adjudication proceeding

9. HLE commenced an adjudication proceeding against CCYR to claim for the revised disputed sum of RM1,441,321.98. On 5.10.2023, the adjudicator published the adjudication decision.

10. The adjudicator decided that:

- (a) HLE's claim for the certified amount due under progress claim No. 28 was allowed in the sum of RM66,253.32; and
- (b) HLE's claim for the balance due under progress claims No. 31, 34, 35 and 36 was allowed in the sum of RM1,070,848.66.

11. The adjudicator ordered CCYR to pay HLE the adjudicated amount of RM1,137,101.98, together with interests and costs.

12. Subsequently, CCYR filed the setting aside application. Correspondingly, HLE filed the enforcement application.

The setting aside application

13. In the setting aside application, CCY contends that the adjudication decision ought to be set aside based on the following grounds:

- (a) the adjudicator had acted in excess of jurisdiction when:



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- (i) she disregarded CCYR's jurisdictional challenge; and
 - (ii) she determined the Final Claim dated 22.2.2023 submitted by HLE, when the payment claim was not based on the Final Claim or unpaid sum under the Final Claim; and
- (b) the adjudication decision did not comply with the express requirement of CIPAA and is invalid.

14. I am conscious not to review the correctness of the adjudication decision, as I do not exercise appellate jurisdiction. A setting aside application under section 15 of CIPAA is not an appeal. It is not the function of the court to second guess the findings of the adjudicator. The facts are for the adjudicator to evaluate and decide upon. (See the Court of Appeal case of *ACFM Engineering & Construction Sdn Bhd v Esstar Vision Sdn Bhd and another appeal* [2016] MLRAU 499; [2015] AMEJ 1095; [2016] 1 LNS 1522; [2016] MLJU 1776).

15. I would be slow to set aside the adjudication decision, as it is not for me to revisit the matters canvassed before the adjudicator. The Federal Court in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd & another appeal* [2020] 6 MLJ 224 held:

"[50] ... (f) the grounds on which the court can rely upon to set aside the adjudicator's determination are limited. The court primary duty must be to uphold the adjudicator's determination and not to revisit the factual or legal matters canvassed before the adjudicator."

16. It is my finding that CCYR's grounds do not justify setting aside of the adjudication decision. CCYR's complaints are mere dissatisfaction over the findings made by the adjudicator, which merits are not susceptible to be challenged in a setting aside application. Here is my explanation.

Alleged excess of jurisdiction that the adjudicator failed to consider jurisdictional challenge

17. CCYR's contention that the adjudicator has disregarded its jurisdictional challenge is untenable. I consider it as an attempt to reopen the merits of the adjudication decision, which is not permissible.

18. In any event, there is no evidence that the adjudicator has refused to consider CCYR's jurisdictional challenge. In fact, the adjudicator had



expressly made reference to CCYR's contention in section J of the adjudication decision.

- (iv) The Respondent is not disputed to the Claimant had on 22nd February 2023 submitted the final claim to the Respondent, as per the Respondent's instruction on 14th February 2023. The Respondent wish to highlight that:
- (a) The claims put forth by the Claimant in these proceeding is not based on the Final Claim;
 - (b) These claims are interim and progressive in nature, and are different from a final claim;
 - (c) The adjudicator's jurisdiction is conferred by and confined to the matters raised in the payment claim and payment response, unless the

parties have reached agreement to extend the adjudicator's jurisdiction to decide other matters.

- (d) There is no agreement between the parties to extend the Adjudicator's jurisdiction to decide any issue relating to the Final Claim;
- (e) The Final Claim is not the subject matter of these proceeding and the Adjudicator has no jurisdiction to deal with any matter arising from the Final Claim.

19. Accordingly, the adjudicator has clearly considered CCYR's jurisdictional challenge. In any event, taking CCYR's argument at its highest and assuming that the adjudicator had refused to consider CCYR's jurisdictional challenge, I consider that the adjudicator is empowered to do so pursuant to section 27(3) of CIPAA.

20. Under section 27(3) of CIPAA, an adjudicator may proceed with the adjudication proceeding notwithstanding a jurisdictional challenge. It reads:

"27. Jurisdiction of adjudicator
...
(3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1)."



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21. The above position was affirmed by the Federal Court in *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22. The Federal Court held that the adjudicator may proceed with the adjudication proceeding, even when there is a jurisdictional challenge (at page 495, CLJ; at page 33, MLJ).

[16] *The term ‘jurisdiction’ under the CIPAA is not used in the administrative or public law sense but in relation to matters within the scope of the CIPAA. On this point, in Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case [2017] MLJU 242 Lee Swee Seng J observed as follows (at para [70]):*

In the application of our CIPAA, we are free from the shackles of the language of administrative law and judicial review. The word ‘jurisdiction’ is used in s 15(d) as in the adjudicator having acted in ‘excess of jurisdiction’ as a ground for setting aside an adjudication decision. It is also used in s 27(1) with respect to an adjudicator’s jurisdiction being limited to the matters raised in the payment claim and the payment response. Then there is a reference to it in s 27(2) with respect to extending his jurisdiction by way of agreement in writing to deal with matters not specifically raised in the payment claim and payment response. Finally there is the reference to a ‘jurisdictional’ challenge, which when raised, does not prevent the adjudicator from proceeding and completing the adjudication without prejudice to the rights of any party to set it aside under s 15 or to oppose its enforcement under s 28 ... Issues as to whether there is a valid cause of action, does not go towards jurisdiction but rather to the merits of the claim”.

22. As such, there is no denial of natural justice, even if the adjudicator did not consider the jurisdictional challenge. Accordingly, CCYR’s contention is without merit.

Alleged excess of jurisdiction when the adjudicator considered and determined the Final Claim

23. CCYR further contends that the adjudicator has no jurisdiction to consider the Final Claim dated 22.2.2023. This is because the Final Claim is not part of the subject matter in the adjudication. As the payment claim was not based on the Final Claim or unpaid sum under the Final Claim.

24. At the outset, it ought to be highlighted that the Final Claim dated 22.2.2023 and the progress claim no. 36 are identical. CCYR’s jurisdictional challenge herein is nothing but a semantic challenge.

25. Furthermore, the adjudicator had clearly identified the issues for her to decide at page 15 of the adjudication decision. Which is the sum of



RM1,441,312.98, being the unpaid certified amount in progress claim No. 28 and non - certification amount in progress claim No. 29 to No. 36.

H: ISSUES TO DECIDE

- (i) The Claimant has raised the following issues for me to decide in the Adjudication Claim:
 - (a) Whether the Respondent is liable to pay the Claimant the sum of RM 1,441,312.98 being the unpaid certified amount for Progress Claim No.28 and the non-certification and non-payment sum of Progress Claim No.29 to No.36;
 - (b) Interest on the unpaid amounts due for Progress Claim No. 28 to No.36.

26. The adjudicator did not make mention of the Final Claim in "*H: Issues To Decide*". There is no evidence that the adjudication decision was based on the Final Claim dated 22.2.2023.

27. CCYR alleges that the adjudicator had considered and determined the Final Claim in the adjudication decision at Section M and Section O. Such allegation is unsustainable.

28. At Section M, paragraph (v) at page 27 of the adjudication decision, the adjudicator merely made an observation that the Final Claim is identical to the amount of progress claim no. 36. However, no determination was made arising from such observation.

- (v) The Respondent failed to assess the valuations, process the claims and issue interim payment certificates upon the progress claim No.29 to No.36 submitted by the Claimant until the main contract was determined on 27th January 2023. The Claimant submitted Final Claim amounting to RM 1,453,638.16 which is identical to the amount of progress claim No.36. The failure of the Respondent to assess the progress claim submitted by the Claimant has prevented the Claimant from issuing tax invoices as required under Clause 8 of the contract in respect of payment due to the Claimant under each progress claim. The due date for the progress claims as follow:

29. At Section M, paragraph (vii) at pages 27 and 28 of the adjudication decision, the adjudicator also merely highlighted the contention raised by the respective parties. Once again, there was no determination made arising from such observation.



(vii) The Claimant dropped its Variation Claims No.16,17,21&22 which were disputed by the Respondent amounting to RM 66,615.75. The Claimant admitted the penalty by Respondent RM 7,850.00 and Covid Test amounting to RM 7,830.50 in the adjudication response. The penalty

notices and back charges statements by the Claimant were acknowledged by the Respondent on site and enclosed in the Final Claim.

30. As such, it is clear that the adjudicator did not decide on the Final Claim dated 22.2.2023 in the adjudication decision.

31. At Section O, paragraph (iii)(c), the adjudication decision merely states that "*The Respondent shall pay for the interest on the uncertified and unpaid work done of progress claim No.31,34,35 & 36 in its final claim*" (in lower case).

(c) The Respondent shall pay for the interest on the uncertified and unpaid work done of progress claim No.31,34,35 & 36 in its final claim amounting to RM 1,070,848.66 at **5% simple interest** rate per annum from 8th March 2023 until full payment and final settlement has been made;

32. It is pertinent to highlight that the wording used by the adjudicator is "*in its final claim*" (lower case, and not in capital letters). It can be seen that the phrase of "*final claim*" does not refer to the Final Claim dated 22.2.2023, which has been referred to in capital letters "*Final Claim*" throughout the adjudication decision. For instance,

(a) Section C1, paragraph (viii)

(viii) Pursuant to the Respondent's instruction dated 14th February 2023, the Claimant submitted their Final Claim showing a balance of RM 1,453,638.16 as due and unpaid by the Respondent.

(b) Section C4, paragraph (i)



C.4. Final Claim

(i) The Claimant submitted a Final Claim dated 22nd February 2023 to the Respondent showing a balance due of RM 1,453,638.16 which has been corrected in the Payment Claim as RM 1,441,312.98.

(c) Section C6, paragraph (ii)

(ii) The Variation claims are provided in Progress Claim No.36 and in the Final Claim.

33. In the context of the adjudication decision, the phrase of “*final claim*” connotes the fact that the adjudicator allowed HLE’s final claim of RM1,070,848.66. That has been revised after HLE dropped the variation claim for RM66,615.00, and admitted the penalty and backcharges of RM7,850 and Covid test fee of RM7,830.50.

34. The above is fortified in Section M, paragraph (xii) at page 28 of the adjudication decision. Where the adjudicator decided the sum of RM1,070,848.66 is based on uncertified and unpaid progress claim No. 31, 34, 35 and 36.

(xii) The Claimant is entitled to the outstanding sum of RM 1,070,848.66 being the uncertified and unpaid progress claim No.31,34,35 & 36.

35. Accordingly, it is clear that the adjudication decision is not decided based on the Final Claim dated 22.2.2023.

36. Even if the adjudicator considered the Final Claim dated 22.2.2023 in the adjudication decision, I consider that CCYR’s jurisdictional challenge is anchored on the incorrect factual proposition that the payment claim was not based on the Final Claim or unpaid sum under the Final Claim,

37. To this end, HLE had clearly pleaded the Final Claim dated 22.2.2023 and annexed a copy of the Final Claim in the payment claim.

15. A Final Claim amounting to RM 1,453,638.16 (which is similar in amount to Progress Claim No. 36) was submitted to you on 22nd February 2023, a copy of which has been included as Schedule 5 of this Payment Claim.



38. As such, the Final Claim dated 22.2.2023 clearly forms an integral part of HLE's claim. Premised on the above, the adjudicator is clothed with the jurisdiction to determine the dispute arising from the Final Claim.

39. CCYR further alleges that the payment claim is not in compliance with section 5(2) of CIPAA. Purportedly because it did not provide the breakdown, and details of the amount claimed under each progress claim. Such contention is a non - starter as HLE had laid down the breakdown of its claim. In any event, section 5(2) of CIPAA merely requires HLE to state the amount claimed and the due date for payment. As such, CCYR's complaint is misconceived.

Alleged non - compliance with section 12(4) of CIPAA

40. Next, CCYR contends that the adjudication decision is invalid as the adjudicator did not provide any reasons in the adjudication decision in respect of her determination in the adjudication. Such contention is baseless.

41. It is indisputable that the adjudicator has correctly identified the issue at hand. This appears at section M of the adjudication decision.

M : FINDINGS AND REASONS																
(i) The issue for me to decide is whether the Respondent is liable to pay the Claimant the outstanding sum of RM 1,441,312.98 in the Payment Claim of the following:																
<table border="1"><thead><tr><th></th><th>Amount (RM)</th></tr></thead><tbody><tr><td>Original Contract Sum</td><td>7,758,215.70</td></tr><tr><td>Add : (a) Variation Orders</td><td>221,914.80</td></tr><tr><td>(b) Back Charge Claimable</td><td>207,830.00</td></tr><tr><td>Adjusted Contract Sum</td><td>8,817,960.50</td></tr><tr><td>Less : Amount Paid</td><td>6,746,647.52</td></tr><tr><td>Outstanding Amount</td><td>1,441,312.98</td></tr></tbody></table>				Amount (RM)	Original Contract Sum	7,758,215.70	Add : (a) Variation Orders	221,914.80	(b) Back Charge Claimable	207,830.00	Adjusted Contract Sum	8,817,960.50	Less : Amount Paid	6,746,647.52	Outstanding Amount	1,441,312.98
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Outstanding Amount	1,441,312.98															
(ii) The amount outstanding comprises of:																
<table border="1"><thead><tr><th>No.</th><th>Description</th><th>Amount (RM)</th></tr></thead><tbody><tr><td>1</td><td>Amount certified against progress claim No.28</td><td>66,253.32</td></tr><tr><td>2</td><td>Balance due under progress claim No. 36</td><td>1,375,059.66</td></tr><tr><td></td><td>Total</td><td>1,441,312.98</td></tr></tbody></table>			No.	Description	Amount (RM)	1	Amount certified against progress claim No.28	66,253.32	2	Balance due under progress claim No. 36	1,375,059.66		Total	1,441,312.98		
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	Total	1,441,312.98														

42. The adjudicator then proceeded to provide adequate reasons in the adjudication decision at section M.



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(iii) The Claimant has submitted the monthly progress claim timely before 20th of each month completed with details and particulars up to progress claim No.36. The Respondent shall make payment within 45 days after the issuance of interim certificate (original copy of the interim claim and tax invoice being presented to the Respondent) in monthly progress claim, payable 90% based on the Respondent's valuation. Ten percent retention sum from the amount payable to be released half after the Certificate of Practical Completion (CPC) and another half release after the Certificate of Making Good Defects (24 months from CPC).

(iv) The Respondent failed to conduct a valuation after the progress claim No.28 submitted by the Claimant on 18th March 2022 for an amount of RM 1,393,476.48 which the Respondent later took 196 days to certify a balance payable of RM 66,253.32 stating that it was meant for the application month October 2022. The tax invoice presented by the Claimant is attached with "The sub-contractor progress application form" which serves as the Interim Certificate for the application month. The Respondent ought to have made payment for the certified progress claim No.28 which is overdue by 4th November 2022 as follow:

(v) The Respondent failed to assess the valuations, process the claims and issue interim payment certificates upon the progress claim No.29 to No.36 submitted by the Claimant until the main contract was determined on 27th January 2023. The Claimant submitted Final Claim amounting to RM 1,453,638.16 which is identical to the amount of progress claim No.36. The failure of the Respondent to assess the progress claim submitted by the Claimant has prevented the Claimant from issuing tax invoices as required under Clause 8 of the contract in respect of payment due to the Claimant under each progress claim. The due date for the progress claims as follow:

No.	Progress Claim Submitted	Date received by the Respondent	Due Date for Payment
(a)	Progress Claim No.31	21 st June 2022	6 th August 2022
(b)	Progress Claim No.34	19 th September 2022	4 th November 2022
(c)	Progress Claim No.35	21 st November 2022	6 th January 2023
(d)	Progress Claim No.36	17 th January 2023	7 th March 2023

(vi) The Claimant revised its outstanding claim amount in adjudication reply of the following:

No.	Description	Amount (RM)
A	Gross Value of works done	7,758,215.70
B	Variation	- 66,615.70
C	Back charges claimed	207,830.00
D	Less : Retention Sum	NIL
E	Project Payment (A-B+C)	7,899,430.00
F	Penalty & Back charges	-7,850.00
G	Covid Test	-7,830.50
H	Payable Project Payment (E-F-G)	7,833,749.50
I	Previous payment	6,746,647.52
J	Amount Payable (H-I)	1,137,101.98

(vii) The Claimant dropped its Variation Claims No.16,17,21&22 which were disputed by the Respondent amounting to RM 66,615.75. The Claimant admitted the penalty by Respondent RM 7,850.00 and Covid Test amounting to RM 7,830.50 in the adjudication response. The penalty



notices and back charges statements by the Claimant were acknowledged by the Respondent on site and enclosed in the Final Claim.

- (viii) The omission from change of models in Sanitary Wares and Fittings were not involve any financial cost as it has been agreed between the Employer and Respondent.
- (ix) No retention sum should be retained as the main contract has been terminated on 27th January 2023.
- (x) I rely on my power under section 25(m) and (n) of CIPAA, the Respondent shall make payment to the Claimant for outstanding sum of work done and release the retention sum.
- (xi) The Claimant is entitled to the outstanding certified and unpaid progress claim No.28 amounting to RM 66,253.32.
- (xii) The Claimant is entitled to the outstanding sum of RM 1,070,848.66 being the uncertified and unpaid progress claim No.31,34,35 & 36.
- (xiii) In accordance with the reasons as stated herein above my conclusion and decision is the outstanding payment not made by the Respondent (included a sum of RM 66,253.32) amounting to RM 1,137,101.98 is allowed.
- (xiv) By reason of the matters stated above, I find and hold that the Respondent shall pay the Claimant the sum of RM 1,137,101.98 under the contract for works done.

43. As can be seen from the above, the adjudicator has given her reasons in deciding the issues raised by the parties. In particular, that:

- (a) CCYR shall pay the sum due in progress claim No. 28 because CCYR failed to conduct a valuation after the progress claim No. 28 was submitted by HLE on 18.3.2022. Where CCYR shall make payment within 45 days after the issuance of an interim certificate by HLE;
- (b) CCYR took 196 days to certify the balance payable of RM66,253.32, stating that it was meant for the application month of October 2022; and
- (c) CCYR also failed to assess the valuations, process the claims and issue interim payment certificates upon the progress claims No. 29 to No. 36 submitted by HLE, until the main contract was terminated on 27.1.2023.

44. Premised on the above reasons, the adjudicator then came to the decision that CCYR must pay the following:

- (a) CCYR to pay HLE the outstanding certified and unpaid progress claim No. 28 amounting to RM66,253.32;



- (b) CCYR to pay HLE the outstanding sum of RM1,070,848.66, being the uncertified and unpaid progress claims No. 31, 34, 35 and 36; and
- (c) CCYR to pay HLE the total sum of RM1,137,101.98 under the contract for works done.

45. As such, CCYR's grievance is clearly not on the 'absence or lack of reasoning', but the 'sufficiency of reasoning'. One must bear in mind that CIPAA imposes a strict timeline on the adjudicator, and the adjudicator is often not legally trained. As such, the requirement of reasons need not be as comprehensive as a court judgment or arbitration award.

46. In *Ranhill E & C Sdn Bhd v Tioxide (M) Sdn Bhd and other appeals* [2015] 1 LNS 1435; [2015] MLJU 1873, the High Court held:

[70] Subsection 12(4) further requires the decision to be in writing. It must also contain "reasons for such decision unless the requirement for reasons is dispensed with by the parties". I would not construe the requirement of "reasons" here to be one that must be full as one would generally see in judgments of the Court or even arbitration awards. What would be required is at the very least, a statement of the adjudicator's reasons for coming to the decision reached. Brevity is not a reason for complaint. The reasons may be succinct, enough or sufficient to show that the adjudicator has dealt with the very issues remitted to him and what his conclusions are on those issues. The reasons may be wrong on the facts or even the law but I do not believe that is enough cause to interfere. The Courts must exercise considerable restraint when invited to set aside an adjudication decision reached in very exacting circumstances and conditions. So much so that it will only be in rare and extreme circumstances that the reasons, brief or otherwise, are found wanting."

47. CCYR complains that the adjudicator has stated that she accepted HLE's position. But without providing reasons why HLE's position was accepted, and CCYR's position was rejected. Such complaint is devoid of merit. To my mind, the adjudicator's acceptance of HLE's position is in itself a sufficient reason for the adjudication decision. Given the adversarial nature of the parties' position, the adjudicator's acceptance of HLE's position (thereby finding that HLE's position is more probable) is in itself a reason for the adjudication decision.

48. The English case of *Balfour Beatty Engineering Services (HY) Ltd v Shepherd Construction Ltd* [2009] EWHC 2218 is instructive, which held:

"[48] Bringing all these strains of judicial observations together, I conclude as follows:



- (a) *The decision needs to be intelligible so that the parties, objectively, can know what the adjudicator has decided and why.*
- (b) *A decision which is wholly unreasoned but which is required to be reasoned is not a decision for the purposes of the Scheme or under contractual machinery which requires a reasoned decision. It would therefore not be enforceable as such.*
- (c) *Because the Courts have said time and again that the decision cannot be challenged on the grounds that the adjudicator answered the questions, which he or she was required to address wrongly, the fact that the reasons given are, demonstrably or otherwise, wrong in fact or in law or even in terms of emphasis will not give rise to any effective challenge.*
- (d) *The fact that the adjudicator does not deal with every single argument of fact or law will not mean that the decision is necessarily unreasoned. He or she should deal with those arguments which are sufficient to establish the route by which the decision is reached.*
- (e) *The failure to give reasons is not a breach of natural justice.*
- (f) *The reasons can be expressed simply. If the reasons are so incoherent that it is impossible for the reasonable reader to make sense of them, it will not be a reasoned decision.*
- (g) *Adjudicators are not to be judged too strictly, for instance by the standards of judges or arbitrators, in terms of the reasoning. This reflects the fact that decisions often have to be reached in a short period of time and adjudicators are often not legally qualified. It certainly reflects the fact that there has not been a full judicial or arbitral type process.*
- (h) *The fact that reasoning in a decision is repetitive, diffuse or even ambiguous does not mean that the decision is unreasoned.”*

49. For CCYR to succeed on breach of natural justice, it must prove that there was a fundamental procedural unfairness going to the root of the decision, such as where one party was heard and the other not. In this instance, there was no procedural unfairness suffered by CCYR in the adjudication proceeding, as ample opportunity was accorded to them to present their case.

50. ‘Backdoor attempts’ to use allegations of natural justice to set aside an adjudication decision should not be allowed. So long as the parties were accorded an opportunity to present their case, there cannot be a complaint of breach of natural justice. (See the Court of Appeal case of *Ireka Engineering and Construction Sdn Bhd v PWC Corp Sdn Bhd & anor appeal [2019] MLJU 35.*)



51. Further, any breach of natural justice must not be peripheral. It must be a material breach, affecting the outcome of the adjudication decision. In determining this question, it is not necessary to investigate all the facts to decide if the adjudicator would have arrived at a different conclusion if the matters complained of were considered. All that needs to be considered is whether there was a real possibility of a different conclusion. (See the Court of Appeal case of *Guangxi Dev & Cap Sdn Bhd v Sycal Bhd & another appeal* [2019] 1 CLJ 592).

52. The function of the court is simply to look at the manner in which the adjudicator conducted the hearing, and whether he had denied natural justice to the parties during the adjudication proceeding. In this instance, I consider the alleged breach of natural justice complained of by CCYR as nothing more than their disagreement with the findings of the adjudicator. But CCYR cannot cloak its dissatisfaction under the guise of a breach of natural justice. An adjudication decision could not be set aside merely on the ground that the adjudicator made a wrong finding, misconstrued the documents or erroneously assessed the evidence. If the adjudication decision is wrong, the forum to correct such error would be in a civil suit or arbitration.

53. In the present case, I see no denial of natural justice. The adjudication decision is in compliance with section 12(4) of CIPAA.

The enforcement application

54. With regard to the setting aside application, I conclude that CCYR has failed to discharge its burden in raising any situation that warrants the adjudication decision to be set aside. CCYR has failed to make out a case that the adjudicator acted in excess of jurisdiction or that there has been a denial of natural justice. I therefore dismissed the setting aside application.

55. As the setting aside application is not allowed, it follows that the enforcement application ought to be allowed.

56. Pursuant to section 28 of CIPAA, HLE applied for an order to enforce the adjudication decision, as if it is a judgment of the High Court. I allowed the enforcement application. I exercised my discretion to do so since the relevant requirements are met. Namely:

- (a) the adjudication decision has been made in favour of HLE, the party applying for leave;



- (b) CCYR, the party against whom the adjudication decision was made, has failed to pay the adjudicated sum by the stipulated date; and
- (c) there is no prohibition on the court's discretionary power to grant leave to enforce the adjudication decision.

57. I follow the Court of Appeal decision in *Inai Kiara Sdn Bhd v Puteri Nusantara Sdn Bhd* [2019] 2 MLJ 362; [2019] 2 CLJ 229 at 238; [2019] 1 MLRA 207 at 213 which held:

*"[25] ... All that the applicant needs to do is to satisfy the High Court that there is an **adjudication decision that had been rendered in the applicant's favour**, that there had been **non-payment of the adjudicated sum** by the date specified in the adjudication decision, and that there is **no prohibition to the grant of the order** that is sought.*

*[26] By this, we mean that the adjudication decision has not been set aside or stayed, that there is no written settlement of the subject matter between the parties, or that there is no final decision rendered on the payment claim, whether made in arbitration or by a court of law. Once these matters are established as matters of fact, the **order to enforce ought to be granted.**"*

Conclusion

58. For the reasons above, I dismissed CCYR's application to set aside the adjudication decision. I allowed HLE's application to enforce the adjudication decision.

59. I ordered CCYR to pay costs to HLE in the following sums - (a) RM5,000 in respect of the setting aside application, and (b) RM5,000 in respect of the enforcement application.

Dated 15 April 2024



Quay Chew Soon
Judge
High Court of Malaya, Penang
Civil Division NCvC 1



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Counsels

Choon Hon Leng and Chan Jian Her (*Messrs Sanjay Mohan*) for CCYR

Lee Kai Jun and Ryan Sia Chee Sen (*Messrs Wayne Siang, Kai & Co.*) for HLE



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